U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 April 2006

CASE NO.: 2005-LHC-1331

OWCP NO.: 04-36767

In the Matter of

BRUCE M. RILEY, JR.,
Claimant

v.

RAG CUMBERLAND RESOURCES LP,
Employer

and

OLD REPUBLIC INSURANCE COMPANY,
Carrier

APPEARANCES:

Stephen P. Moschetta, Esquire
For the Claimant

Valerie S. Faeth, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et. seq., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. § 905(a).

PROCEDURAL HISTORY[1]

The claimant filed his claim on November 16, 2004. The claimant seeks permanent total disability benefits, or in the alternative, temporary total disability benefits, for an injury sustained on February 3, 2004. On March 25, 2005, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on August 2, 2005.

A formal hearing was held before the undersigned on December 5, 2005, in Pittsburgh, Pennsylvania, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits ("CX") 1- 11 and 13-17 and Employer's Exhibits ("EX") 1- 9 were admitted to the record without objection. The record remained open post hearing for the submission of additional medical evidence and closing briefs. Briefs were due and received on February 17, 2006. I permitted the employer a reply brief, which was submitted on March 6, 2006.

I. STIPULATIONS

The parties stipulate and I find:

A. The claimant sustained an accidental injury on or about February 3, 2004.

B. At the time of the injury, the claimant was working for the employer, under circumstances bringing the injury within the purview of the Act or extensions thereof. The injury occurred in the course of the claimant's employment.

C. The claimant was employed by Cumberland Resources, LP, as a barge loader, at the Cumberland Harbor facility, at the time of the work-related injury.

D. The Cumberland Harbor facility is located at/on the Monongahela River, Greene County, Pennsylvania.

E. The claimant reported the accident to the employer, on February 3, 2004 and, thus, provided timely notice of his injury to the employer.

F. The claimant was first treated for his condition on February 3, 2004, at Greene County Memorial Hospital, in Waynesburg, Pennsylvania.

G. The claimant returned to work briefly with the employer on October 10, 2004.

H. The claimant received, from the employer, temporary total disability payments of $33,424.46, for the period of February 4, 2004 through October 9, 2004.

[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "LX" for a Carrier's exhibit; "Dep." for that witness' deposition; and, "EX" for an Employer's exhibit.

I. The claimant has not performed any work for wages since the date he last worked for Cumberland Resources, LP, on October 20, 2004.

J. The employer filed timely notice of controversion.

K. The claimant received temporary total disability benefits from the employer, voluntarily and without an award, at a rate of $939.66 per week for 35 5/7 weeks.

L. The claimant's average weekly wage ("AWW") is $1409.50 with a compensation rate of $939.66.

II. ISSUES

A. Whether the claimant continues to suffer from, and require further medical care and work-related injury, impairment or disability suffered on February 3, 2004?

. B. Whether the claimant is permanently and totally disabled because of work-related injuries which occurred on February 3, 2004?

C. Whether the claimant's disability benefits, which were terminated by the employer as of October 9, 2004, should be reinstated effective October 21, 2004, to the time that the claimant is adjudicated as permanently and totally disabled and continuing through the duration of that disability?

D. Whether the employer should pay the claimant's medical expenses, pursuant to Section 7 of the Act, less amounts paid by the employer, and whether the employer should provide such additional services as the claimant's condition may require?

E. Whether the claimant is entitled to interest, under Section 14(e) of the Act?

III. FINDINGS OF FACT

A. BACKGROUND

The claimant is 64 years old, has a high school degree pursuant to GED and is a resident of Carmichaels, Pennsylvania. He was hired by U.S. Steel, in March 1969, and assigned to work at the Robena Coal Mine as a mechanic trainee, mechanic, and electrical inspector. In 1979, he was transferred to U.S. Steel's underground Cumberland Mine until 1978, when he transferred to the mine's preparation plant until the 1990's. He was then assigned to the Cumberland Harbor Facility, as a train operator/engineer and later, a barge loader. As a barge loader, he was primarily responsible for loading clean coal onto barges. (TR 29).

On February 3, 2004, the claimant, while working as a barge loader at the employer's harbor facility, exited the pulpit, a small building above the River that houses the control panel

for the barge loader, descended several steep steps going to the mooring cell, slipped on ice and struck a nearby railing as he fell, ultimately landing on the ground until assisted up by co-workers and taken by ambulance to the Greene County Memorial Hospital. He had injured his right shoulder, right ribs, and right hip in the fall. (TR 48). He filed a claim, on November 16, 2004. (CX 1).

B. CLAIMANT'S EVIDENCE

Claimant's Testimony

Clean coal is shipped via train to the harbor where it is stored in silos. The barge loader then loads the coal onto a belt and then into barges. Barge loaders work in a pulpit, a climate controlled, glass-enclosed space housing a control panel. (TR 35, 91, CX 16). Barge loaders use buttons and a joystick on the control panel to perform their job. The control panel also has a marine radio.

On February 3, 2004, the claimant, while working as a barge loader at the employer's harbor facility, exited the pulpit, a small building above the River that houses the control panel for the barge loader, descended several steep steps going to the mooring cell, slipped on ice and struck a nearby railing as he fell, ultimately landing on the ground until assisted up by co-workers and taken by ambulance to the Greene County Memorial Hospital. (CX 2; CX 3). He had injured his right shoulder, right ribs, and right hip in the fall. (TR 48). He notified his foreman, George Ganocy of the injury. (TR 49-50). Greene County Memorial Hospital released him the same day. (TR 50-51).

Employer's medical case manager, Molly Richards, contacted him the next day and advised him to see Dr. Vrablik. Dr. Vrablik prescribed physical therapy and ordered an arthrogram of the right shoulder which revealed a torn rotator cuff. (TR 51-53). He referred the claimant to Dr. Armando Avolio who operated on the claimant's right shoulder, on June 23, 2004. (TR 53). The claimant continued treating with Dr. Armando Avolio after the surgery, last seeing him on October 6, 2004 (TR 54). Dr. Avolio extended his right arm above his head and the claimant experienced severe pain of which he told the doctor. Dr. Avolio prescribed three more weeks of therapy. (TR 55; CX 7, p. 2).

Molly Richards scheduled a "return to work" examination for October 8, 2004. Following the examination, he was released to return to work. (TR 57). Thereafter, having lost faith in Dr. Avolio, he scheduled an appointment with Dr. Mitchell for October 28, 2004. (TR 58).

The claimant returned to work on October 10, 2004 and worked intermittently for six days. (TR 88-89). He testified that he merely sat and watched another employee, Danny Lama, perform barge loader duties for two or three of the six days of work. (TR 62). Mr. Riley testified that extending his right arm at work aggravated his pain so severely that he left work early on a few occasions, using vacation or "personal" days because the pain was severe. (TR 90, 106). He testified that upon his return home he took pain pills. (TR 106). [The employer averred that no "early-out" slips were on file for Mr. Riley between 10/10-10/20/04 to show he did not

leave work early, but Mr. Kiger testified that it is possible Riley may have completed slips and he simply did not remember. (TR 126, 132).]

Dr. Mitchell examined the claimant, on October 28, 2004, and ordered an MRI scan of his right shoulder. (TR 58-59). He continues to treat with Dr. Mitchell.

The claimant testified that the pain in his right shoulder never goes away and affects his ability to move his right arm. (TR 64). Mr. Riley testified that he is unable to take pain medications regularly because they interfere with his insulin levels which he takes to control his diabetes. (TR 67-68). He must hold his right arm close to his body with his right hand resting on his belly to keep the pain from becoming too severe. (TR 65-66). If he lets his right arm hang down at his side, his shoulder throbs. (TR 66). When he moves his arm, he feels a shooting pain; and if he moves suddenly, it feels like somebody stabbed him in the shoulder. (TR 64). He admits he can grab something with his right hand if it is about six to ten inches away from his stomach and straight ahead of him, but claims his right shoulder hurts if he reaches any further than that. (TR 68-69).

The claimant contends that his right shoulder pain prevents him from grocery shopping, performing household chores, dressing himself, putting on shoes and socks, and fishing. (TR 69-72). He can drive only 20-30 minutes before his shoulder hurts and he must stop. (TR 66-67). He has had to sleep in a recliner because the pain is too intense when he rolls over in bed. (TR 67). He feels discomfort sitting too long and has pain when he tries to reach to the side or upwards in front of him. (TR 68). He says he can only reach out a few inches in front of his stomach. (TR 68-69). His wife, who is dependent upon him for support, confirms that he has been unable to mow the lawn, shovel snow, help with dishes, or cook, since the accident. (TR 111-112). He admits he has no problem moving his lower right arm. (TR 65).

The claimant testified that as a barge loader he sometimes, but rarely, had to simultaneously push two buttons on the control panel. (TR 74-75). His right shoulder pain would prohibit him from performing certain barge loader duties because he has trouble reaching with his right arm. He testified that he could not reach certain buttons on top of the control panel, including an emergency stop switch. (TR 75). However, he admitted he could stand to reach the buttons on top and get the marine radio (rather than remaining seated) and reaching overhead. (TR 81-82). Although he is not as good using his left hand, he admitted he could perform his duties using his left arm and that he drives using his left hand. (TR 81, 98-99). He also admitted that use of both hands is only rarely required. (TR 105). He also testified that an employer-provided chair allowed him to reach the lower portion of the control panel (with his right arm) while seated without reaching. (TR 107-108).

Other Evidence/Witness Testimony

Mrs. Riley testified that her husband is much different now than before the accident. (TR 110). He used to play with the grandchildren and work around the house, but cannot do so since the accident. (TR 110). After his shoulder surgery, he did not improve enough to return to his normal activities. (TR 111-112). Mrs. Riley continues to help her husband in routine matters such as bathing and dressing and observes that he still cannot sleep in comfort. (TR 110-112).

She observed that right-handed Mr. Riley often forgets about the injury and reaches with his right arm resulting in the arm locking up which is extremely painful. (TR 113-114). She has seen him crying and has had to massage the arm to relax and unlock it so it could move again. (TR 114).

Mr. Donald Kiger, Operation Manager, Cumberland Harbor Facility, testified that he is in charge of overseeing the barge loading, transportation of coal from the mine to the harbor, and scheduling employees. (TR 118). He was informed the claimant was returning to work in October 2004 and understood he was restricted to sedentary duty. (TR 118). Thus, the claimant would not have been responsible for shoveling coal or performing duties outside his work restrictions. (TR 119). Nor would the claimant have been required to respond to emergencies because others were available to do so. (TR 128-129).

Mr. Kiger explained the emergency button at the bottom of the control panel shuts everything down, while the emergency button on top of the control panel is simply a start and stop button for the belts. (TR 132). He testified that an individual could perform barge loader duties with one arm. (TR 128). Mr. Kiger testified that the job is still available to the claimant and that the employer would continue to accommodate his restrictions if he returned. (TR 119-120).

Mr. Chuck Barnhart, Surface Manager, Cumberland Harbor Facility, testified that the Union contract requires the employer to keep a union member's position available even if he suffers a work-related injury and is disabled from working for a long time period. (TR 143). Mr. Riley's job remained available and would remain so until he retired. (TR 143). The employer allows employees to work with restrictions provided the employee can still perform the essential duties of his or her job. (TR 145).

The control panel used by barge loaders is 24" wide with an upward slope, and 16" high from approximately chest level up. (TR 136; CX 16). It is about 3.5 feet deep, but there is nothing behind it that an operator would have to get to. (CX 16; TR 136). According to the job analysis, the operator may sit for about 1 ½ hours at a time, on an adjustable, high-backed, arm chair on a wheel base at a height of 39" from the floor. (EX 2). The console has multiple buttons and lights. (CX 16; TR 132). The red button on top of the console is a start/stop button for the belts. (CX 16, p. 5; TR 132). The large red button at the bottom right of the console shuts off everything, both belts "B" and "C". (CX 16, p. 5; TR 132). To the left of the console is a separate panel with twelve buttons used to sample the coal for every barge. (CX 16, p. 4; TR 132). Above the console is a glass-enclosed device not used any more. (TR 135). The joy stick or lever is about 1/3 of the way or about 5-6" up the panel from its front edge. (CX 16).

The employer submitted a "barge loader" job analysis, dated November 12, 1999. (EX 2). The barge loader operates controls, on a control panel, which routes coal from a beltline into barges from a climate-controlled, enclosed, glass booth. (EX 2). Using the control panel, he operates winches needed to secure and move barges beneath the coal chute for loading. The operator pushes buttons to rotate the winches which turn cables which move the barges. (TR 138). He is required to communicate with tug boat operators, their crews and dock men, over a marine radio and pager. (The microphone hangs on the wall to the left of the control panel. (CX

16). The work is "sedentary" involving sitting most of the time with occasional standing and walking. "Sedentary" is defined as requiring one to exert up to 10 pounds of force occasionally, to lift carry, push, pull, or otherwise move objects, including one's body. (EX 2). Barge loaders are rarely required to lift, carry, reach overhead, grip, and climb 17 metal stairs to and from the booth. They occasionally reach at or below shoulder level to operate a lever and buttons on the console. 0.2 pounds of force is required to push the buttons and 0.4-0.6 pounds to use the lever. (EX 2). Barge loaders are not required to: have forearm rotation; manual dexterity; bend or twist; or, kneel. (EX 2). They must be able to hear, see and speak. (EX 2). According to Mr. Kiger, three barges are loaded at a time taking up to 1.5 hours with eleven loaded per day. (TR 137). Mr. Kiger did not think that Mr. Riley's large belly would interfere with operating the panel. (TR 132). Mr. Kiger testified that a one-arm person could work as a barge loader. (TR 128). Mr. Kiger testified that a barge loader, with his seat raised belly height, must extend his arm to reach buttons at the top of the console. (TR 130-22). As of the trial date, Mr. Riley's job had not been filled. (TR 129).

The employer submitted a photo of Mr. Riley sitting at and operating the control panel. (EX 4; TR 107). He admitted that if he wanted to push a button or operate a lever on the top part of the console, he could stand to do so. (TR 108). CX 16, page 2, shows another barge loader extending his right arm to the top of the console. At his earlier deposition, Mr. Riley characterized the barge loader job as "pretty easy" and not requiring anything besides pushing buttons. (EX 1).

Mr. Riley chose to retire after the hearing. (EX 13). The parties dispute whether it was voluntary or not. The Certificate of Retirement shows that Mr. Riley has a source of income during his retirement. (EX 13). At his earlier (Sept. 30, 2002) deposition, Mr. Riley testified that "I'm getting ready for my pension. . . 18 months and counting." (EX 1).

Hospital Records

The examination and x-rays of Mr. Riley, on February 3, 2004, at the Greene County Memorial Hospital, showed a fracture of the right, fifth rib, but no significant abnormalities of the right hip and right shoulder, per x-ray. (CX 3). An April 7, 2004, body bone scan suggested occult fractures of the right, fifth, sixth and seventh ribs, as well as showing mild degenerative changes in his right shoulder and lower lumbar spine. (CX 3). An April 12, 2004 arthrogram revealed findings consistent with a large rotator cuff tear and impingement of the right shoulder from degenerative changes and a prominent, inferior, clavicle spur shown distally. (CX 3).

Physician Opinions

Dr. Vrablik treated Mr. Riley from February 4, 2004 through May 26, 2004. (TR 51; CX 4). He diagnosed him with a right shoulder rotator cuff tear with impingement and fractured right ribs at the fifth, sixth and seventh ribs. (CX 4). Initially, he recommended that Mr. Riley not return to work. He noted Mr. Riley suffered atrophy of the supraspinatus muscle. (CX 6). In May 2004, Dr. Vrablik recommended a return to work with modified, sedentary, duties, and no use of the affected body part. (CX 4 p. 2). Mr. Riley underwent physical therapy from February 6, 2004 through June 3, 2004, but experienced no improvement and was referred to Dr. Avolio,

an orthopedic surgeon. (TR 52; see also CX 5). Dr. Vrablik wrote that Mr. Riley was unable to perform his job from the date of the accident through May 26, 2004. (CX 4 p. 24).

Dr. Armando Avolio is a board certified orthopedic surgeon who devotes about twenty-five percent of his practice to treating shoulder problems. He first examined Mr. Riley on March 9, 2004. (Dep. p. 8). Mr. Riley had brought along an MRI which showed some degenerative changes in the right shoulder with a possible rotator cuff tear. (Dep. p. 8). Initially, he treated Mr. Riley conservatively with injections to decrease inflammation. (Dep. 10). He examined the claimant, who complained of continued pain, again, on April 6, 2004. The May 19, 2004 report shows Mr. Riley had a passive range of motion to 150 degrees flexion and 145 degrees adduction and active flexion of 110 degrees and active adduction of 85 degrees. (CX7, p. 7). Dr. Avolio diagnosed Mr. Riley with a right rotator cuff tear and recommended surgery. He operated on it on June 23, 2004. (CX 3).

The surgery, which was a right rotator cuff repair and acromioplasty, revealed a tear of the supraspinatus with detachment from the greater tuberosity. (CX 3). Dr. Avolio attempted to repair the tear with sutures and an anchor. (CX 3). Mr. Riley seemed pleased at post-surgery follow-up appointments. A July 11, 2005 MRI did not reveal a tear or retear of Mr. Riley's right rotator cuff. (Dep. p. 28-29). Dr. Avolio testified that post surgery, the claimant had no signs of impingement or the shoulder becoming frozen. (Dep. p. 39).

Dr. Avolio prescribed additional physical therapy at NovaCare, which Mr. Riley underwent from July 26, 2004 through September 13, 2004. (CX 5). The NovaCare report of 8/30/04 reflects some improvement with internal rotation at 70 degrees versus the earlier 60 degrees and external rotation at 65 degrees versus the earlier 55 degrees. He was discharged from NovaCare care on September 30, 2004. (CX 5). At the August 18, 2004, post-surgical appointment, Dr. Avolio noted 90 degrees of passive flexion, 105 degrees of passive abduction, and 75 degrees of active abduction. (Dep. p. 18). Mr. Riley continued to treat with Dr. Avolio until October 6, 2004. At that time, Dr. Avolio believed the range of motion was improving. (Dep. p. 20-1).

Dr. Avolio's October 6, 2004 office note states that Mr. Riley:

> presently is making slow but sure gains with physical therapy to date. Physical examination today he tolerates passive range of motion to 120 degrees of abduction and flexion. He has active abduction to about 85 degrees, active flexion to 90 degrees. Motor distally is 5/5, sensation is intact. Motor proximally is 4+/5.

(CX 7, page 2; Dep. pp. 20-1). Dr. Avolio reviewed Mr. Riley's job and planned to have him continue with three weeks of aggressive physical therapy and "plan to return to work after next visit" with a repeat evaluation in three weeks. (CX 7). Dr. Avolio released Mr. Riley to work that day, on a work status update form, believing he could perform his duties. (TR 55-56; CX 7; Avolio Dep. pp. 30, 33, 35). On November 3, 2004, Dr. Avolio wrote that Mr. Riley had missed several appointments, however, had he returned on October 27, 2004, as planned, he would have

been released to perform his sedentary job (requiring operations below shoulder level) which was within his (then) capabilities.[2] (CX 7). He believed Mr. Riley could have performed his job even if there was a retear of his rotator cuff. (Dep. 28-29).

Dr. William Mitchell is board certified in orthopaedic surgery with an impressive resume. (CX 17). Dr. Mitchell's narrative reports of October 28, 2004 and October 12, 2005 were submitted. (CX 8 & 15). In his October 28, 2004 report, Dr. Mitchell diagnosed Mr. Riley with mechanical bony blockage in the right shoulder with adhesive capsulitis and ordered him off work. (CX 8). He noted the soft tissue contracture would not improve until the bony blockage was corrected. (CX 8). Dr. Mitchell wrote that the claimant has a limited range of motion with his right arm/shoulder accompanied by pain with difficulty sleeping due to pain when rolling on his right shoulder, popping feeling in the right shoulder and difficulties with grooming and reaching above shoulder level. (CX 8, pp. 17-22). He referred Mr. Riley to Sweeney Rehab and Fitness for physical therapy which he began on February 3, 2005, attending twice a week to address arthrofibrosis and chronic rotator cuff syndrome. (CX 11, p.1).

From March 2005 through September 2005, Dr. Mitchell's notes show Mr. Riley had continued right shoulder stiffness and shoulder pain with restricted mobility of his right arm along with the inability to lift heavy objects. (CX 8, pp. 1-16). He continued to have difficulty sleeping and raising his right arm. (CX 8). On September 9, 2005, he noted the claimant's examination was positive for supraspinatus tendonitis and right shoulder abduction tendonitis at 65 degrees along with right shoulder impingement. (CX 8). He diagnosed Mr. Riley with post-traumatic shoulder impingement syndrome, post-traumatic rotator cuff tendonitis, post-traumatic bicipital tendonitis, and post-traumatic adhesive capsulitis. (CX 8, pp. 1-2).

Dr. Mitchell's October 12, 2005 report reflects he first saw Mr. Riley, on October 28, 2004, for a second opinion. He complained of constant pain and no use of his right shoulder. Dr. Mitchell noted Mr. Riley's right arm grip strength was weaker than his left and that he had limited range of motion in his right arm. Mr. Riley was only able to abduct his right arm 45 degrees, rotate it 45 degrees, and elevate it 180 degrees. Because he could not passively move his arm much beyond this point, Dr. Mitchell opined he had a bony mechanical blockage which if not corrected would preclude improvement of the claimant's range of motion. (CX 15).

Dr. Mitchell treated Mr. Riley with treatments including nerve blocks (on 1/10/05, 8/22/05, and 10/17/05) and injections in his right shoulder to relieve pain.

On October 12, 2005, Dr. Mitchell reported the results of two right shoulder MRI scans, October 28, 2004 and January 11, 2005. Although he reported the first MRI suggested a full thickness retear of the rotator cuff, he opined the January 11, 2005 scan did not reveal any evidence of a full thickness tear. (CX 15). Dr. Mitchell observed on x-rays that the metallic anchor Dr. Avolio had used to repair Mr. Riley's right shoulder, in the 6/23/04 surgery, provides no separation that would be found in a normal shoulder x-ray (i.e., ¼" to ½" separation). (CX

[2] Claimant's counsel refers to Dr. Avolio's alleged contact with the employer/insurer citing the doctor's deposition. The deposition testimony reflects he did not specifically recall discussing return to work with any representative of the employer or insurer in connection with his October 6, 2004 note. (Claimant's Brief, page 7). I am not willing to attribute any nefarious motive based on that evidence.

15, p. 2). The bony block, at the point of the anchor, obstructs and impinges complete motion and causes pain. (CX 15, p.2). Despite a second nerve block, on November 22, 2004, the fluoroscopy unit established there was a block for active motion, in spite of complete pain relief. Dr. Mitchell also noted Mr. Riley's grip strength was "grossly weaker" on the right than left.

Dr. Mitchell concluded that Mr. Riley did not have any functional use of his right arm, right shoulder and upper extremity and that his limited right shoulder function was permanent preventing Mr. Riley from returning to duties as a barge loader. (CX 15). This resulted from the 2/3/04 accident and subsequent 6/23/2004 surgery. While Mr. Riley may have a secondary adhesive capsulitis, it is of little consequence because unless the bony blockage can be corrected, the soft tissue contracture will not improve. This diagnosis was made after injecting the right shoulder with medication to numb all pain and even with the medication the claimant's range of motion was limited due to shoulder blockage. (CX 15, p.2).

According to Dr. Mitchell, as of October 12, 2005, Mr. Riley could abduct his right arm only 45 degrees whereas he could abduct his left arm to 85 degrees. (CX 15). He externally rotated his right arm only 45 degrees, but could do the same with his left arm to 90 degrees. He elevated his right arm only to shoulder level, but could overhead lift his left arm 180 degrees. (CX 15, p.2). Dr. Mitchell observed that "any attempt at muscle contraction, even in his available range of motion movement creates pain. . ." Dr. Mitchell disagreed with Dr. Tucker's initial report finding only residual arthrofibrosis because the latter had also found atrophy, "which would indicate a permanent degree of weakness and interference with normal should function." (CX 15). That atrophy indicates a loss of active motor power in those areas of long-standing. Based on his observations, Mr. Riley is not magnifying symptoms as Dr. Tucker suggested. A December 6, 2005 office note reported that Mr. Riley had 80 degree abduction, 70 degrees of external rotation and 160 degrees of elevation in his right shoulder, an improvement over the previously recorded measurements.

Dr. Mitchell states the rotator cuff tear is not the problem; rather it is the bony blockage. As long as it remains, Mr. Riley's level will not improve. He states, "there is no possibility of him using this arm in the fashion he has described as necessary for his work." He concluded that Mr. Riley "really has no functional use of his right shoulder and upper extremity because of the pain imposed when he maneuvers at nipple level and higher."

Mr. Riley last saw Dr. Mitchell before the hearing on December 6, 2005. (CX 19). At that time, Dr. Mitchell noted pain, stiffness and stopping motion of the right shoulder due to pain. The Hawkins and Neer impingement tests were positive. (CX 19). He has not released Mr. Riley to work. According to Dr. Mitchell, another surgery would be required to remove the bony obstruction, but is risky because the rotator cuff may not heal leaving him "with a right upper extremity hanging limply at his side." (CX 15). Since the risk of further surgery is great, removing the bony obstruction is not a realistic option. Thus, Dr. Mitchell concludes Mr. Riley has a permanent limited shoulder function which prevents him from returning to his duties as a barge loader. (CX 15).

Other Evidence

The claimant submitted the December 8, 2005 report of Kevin L. Sweeney, Physical Therapist, Sweeney Rehabilitation and Fitness.[3] Therapist Sweeney had conducted physical therapy on the claimant from February 3, 2005 through September 12, 2005, at Dr. Mitchell's urging. (CX 11). Initially, Mr. Riley's range of motion was severely limited but showed improvement. Mr. Riley began having significant and increased pain in (reporting 8-10 on a 10-point scale) his right shoulder during physical therapy and post exercise. (CX 11, p. 8). By April 6, 2005, Mr. Riley continued to have "progress and improvement" in his range of motion, but reported his pain continued. (CX 11, p. 21). A 5/4/05 reevaluation reported Mr. Riley continued to have increase in crepitation in the glenohumeral joint with active movement at home. (CX 11, p. 27). Sweeney Rehabilitation reported that Mr. Riley was always compliant with all rehabilitation activities. (CX 11, p.44). However, on July 26, 2005, it was reported that his pain continued with rotary type movements and overhead movements. (CX 11, p. 50).

At the request of the undersigned, counsel had Sweeney Rehabilitation take measurements of Mr. Riley's reach while sitting upright with his knees touching a low table. (TR 140; CX 18). Therapist Sweeney wrote that Mr. Riley was tested in a seated position, on December 8, 2005. Mr. Sweeney indicated the claimant was only able to reach 23 inches from the midline of his shoulder or 6" to 8" from the front of his knees. From the floor up to the palm of his hand, the claimant was able to elevate his shoulder 40 inches and that this was approximately 75 to 80 degrees of shoulder flexion while in a seated position. The claimant was unable to sustain this elevated position for more than one minute before having to lower his hand due to pain.(CX 18).

C. EMPLOYER'S MEDICAL EVIDENCE

The employer suspended temporary total disability payments pursuant to a Notice of Final Payment or Suspension of Compensation Payments issued on October 8, 2005, based on an Affidavit of Recovery signed by Schmieler, M.D., during an Independent Medical Examination on October 8, 2004. (EX 8).

Physician Opinions

The employer submitted the reports and deposition testimony of Dr. Jon B. Tucker, a board certified orthopedic surgeon.[4] Dr. Tucker is a board certified orthopedic surgeon whose office and surgical practice is about 40 percent devoted to treating shoulder disorders. (Tucker Dep. at 7). Dr. Tucker examined Mr. Riley, on January 4, 2005, and reviewed details of Mr. Riley's job and extensive enumerated treatment records (not including Dr. Mitchell's reports or Sweeney Rehab reports) from 2/3/2004 through 11/3/04, submitting an initial report. (EX 5; Tucker Dep. at pp. 41-42). Dr. Tucker reviewed two MRIs [10/28/04 and 3/2/04-showing tears

[3] The parties disagreed about the admissibility and usefulness of these measurements I had asked for. The employer believes they are contradicted by Dr. Mitchell's measurements of December 6, 2005. The claimant avers, and I agree, that Sweeney measured something different than Dr. Mitchell. Thus, I do admit and consider the report.
[4] Claimant's January 4, 2006 motion to strike portions of the deposition is denied.

of the supraspinatus tendon and degenerative changes of the same, as well as atrophy of the supraspinatus muscle] and an x-ray taken that day (January 4, 2005), which showed a healed rotator cuff without retear and no bony blockage. (Dep. p. 23-25; CX 4; CX 6). The x-ray revealed acromioclavicular degenerative changes and a small inferiorly projecting spur. (EX 5). The physical examination took about 5 minutes, which Dr. Tucker felt adequate. (Tucker Dep. at 37). He believed Mr. Riley was uncooperative during the "range of motion" portion of the examination. Dr. Tucker concluded that Mr. Riley's cervical range of motion is normal into flexion extension, lateral bending and rotation. He found mild atrophy of the (right) deltoid and supraspinatus fossa. (EX 5). Atrophy is typical following such surgery and implies that the patient was not fully rehabilitated. (Dep. p. 17). Dr. Tucker stated the post-operative MRI would not reveal whether Mr. Riley's rotator cuff tear has healed—a plain film arthrogram is needed to determine that. (EX 5).

Dr. Tucker concluded that Mr. Riley "is clearly capable of performing his work duties. . . [E]ven if he has failed to heal his rotator cuff tear and if he has a frozen shoulder, the range of motion he should be able to obtain with his arm is clearly sufficient to perform the essential and secondary aspects of his pre-injury job." (EX 5). Dr. Tucker's attached "Physical Capacities Evaluation" shows that Mr. Riley can reach (with some restriction), grasp, perform "fine manipulation", push and pull, and perform light to medium work. (EX 5). Dr. Tucker's review of an 11/2/2004 EMG nerve conduction study, by Dr. Kaplan, revealed no focal compressive peripheral lesion. (EX 5, 6).

Dr. Tucker's later deposition and report encompassed more information, however. (Tucker Dep. at pp. 9-11, 42). He noted that the ranges of motion reported by Dr. Avolio and Mitchell were all greater than during his examination. He did not perform Neer or Hawkins maneuvers, tests to ascertain impingement, because Mr. Riley would not permit it. (Dep. p. 49). Dr. Tucker found it significant that Mr. Riley had excellent axillary hygiene and no skin irritation or infections under his right arm. (Dep. pp. 18, 47, 58). Because the claimant had not retorn his rotator cuff, Dr. Tucker would lift the restrictions on reaching. (EX 12; Dep. p. 29). He reiterated his conclusion that Mr. Riley could perform his duties and released him to full-time light work and part-time medium duty work. (EX 5; Dep. pp. 22-23). Dr. Tucker opined the claimant had not reached maximum medical improvement because his physical therapy records show progressive improvement. (Dep. p. 30). He observed that in his fifteen years of shoulder surgery, he has never had a patient develop a bony blockage. (Dep. p. 31).

IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96(CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs*., 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an

employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). This last element is the "situs" test. *E.g., Schwalb*, 493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc*. 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

A. JURISDICTION[5]

A party seeking benefits under the Act has the burden of establishing jurisdiction. Director, OWCP, v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed2d 221, 28 BRBS 43(CRT)(1994), aff'g 990 F.2d 730 (3d Cir. 1993). In order for a claimant to be eligible for benefits ("coverage" or personal jurisdiction under the Act), the LHWCA, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. Pfeiffer Co. v. Ford, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979).

Maritime workers are permitted to collect benefits under the LHWCA, even if they are injured on land, so long as they meet the following tests:

> (1) Status - the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. See 33 U.S.C. § 902(3); 20 C.F.R. § 702.301(12).
> (2) Situs - the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal, building way, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel."[6] See 33 U.S.C. § 903(a).

In 1983, the Supreme Court held that Congress had not intended to withdraw any coverage when it passed the 1972 amendment, which added the "status" requirement and expanded the "situs" definition. Therefore, any worker injured on navigable waters could claim under the LHWCA regardless of whether he or she met the statute's "status" requirement of

[5] The law of the Circuit in which injury occurs is applicable. *Roberts v. Custom Ship Interiors*, 35 BRBS 65 (May 15, 2001)(BRB No. 00-832), 300 F.3d 510 (4th Cir. 2002) *cert. den*., 123 S.Ct. 1255 (2003). Here, Third Circuit law is applicable.

[6] The Third Circuit's "situs" test, articulated in *Sea-Land Service v. Director, OWCP*, 540 F.2d 629 (3rd Cir. 1976) was discredited in *Northeast Marine Terminals Co. Inc., v. Caputo*, 432 U.S. 249, 264-65 (1977).

being a "maritime employee." *Director, OWCP v. Perini N. River Assoc*., 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465, [15 BRBS 62(CRT)](1983); see also *Bienvenu v. Texaco, Inc*., 164 F.3d 901 (5th Cir. 1999)(en banc). Thus, if a worker is injured on a navigable water situs, he need only show that he works for a maritime employer in order to be eligible for LHWCA benefits.

If the same worker is injured, instead, on an adjoining dock, pier, wharf, dry dock or loading area, he must also prove that his particular job is of a "traditionally maritime" status, or connected to ship-loading,[7] ship building, ship repairing, etc., to claim LHWCA eligibility. *See Texports Stevedore Co. v. Winchester*, 554 F.2d 245, 6 BRBS 265, aff'd on reh'g en banc, 632 F.2d 504, [12 BRBS 719] (5th Cir. 1980)(en banc), cert. den. 452 U.S. 905 (1981)("adjoining area" should focus on functional relationship or nexus between "adjoining area" and maritime activity on navigable waters); *Olson v. Healy Tibbits Construction Co*., 22 BRBS 221 (1989); *Arjona v Interport Maintenance Co., Inc*., 31 BRBS 86 (1997); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978)(four-factor test); and, *Waugh v. Matt's Enterprises, Inc*., ___ BRBS ___, BRB No. 98-0735 (Feb. 23, 1999)(applies Brady-Hamilton functional relationship test).[8] An adjoining area must have a maritime use, but need not be used exclusively or primarily for maritime purposes. *Texports, supra; Stratton v. Weedon Engineering Co*., 35 BRBS 1 (2001) at 4; *Bianco v. Georgia Pacific Corp*., 35 BRBS 99 (2001) *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Circuit 2002). The Board determines coverage (situs), under section 3(a), by the nature of the place at the moment of injury. *Charles v. Universal Ogden Services, et al*, 37 BRBS 37 (2003)(arising in 5th Circuit) citing *Stroup v. Bayou Steel Corp*., 32 BRBS 151 (1998) and *Melerine v. Harbor Construction Co*., 26 BRBS 97 (1992).

An "area" is not limited to the pin-point site of the injury; rather determination of whether an area is a covered situs requires an examination of both the site of the injury and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Bianco v. Georgia Pacific Corp*., 35 BRBS 99 (2001) *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Circuit 2002).[9] Both the Benefits Review Board (BRB) and the courts have held

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[7] See *Bianco v. Georgia Pacific Corp*., 35 BRBS 99 (2001) *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Circuit 2002) and *generally Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46, 49 n. 2 (1994), *aff'd on recon*., 29BRBS 15 (1995) regarding "unloading."

[8] The tests are: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to use in maritime commerce; (3) proximity to the waterway; and, (4) whether the site is as close to the waterway as feasible given all the circumstances of the case. *Brady-Hamilton Stevedore Co.*, *supra*. *See also Sowers v. Metro Machine Corp*., 35 BRBS 154 (2001), 35 BRBS 181, (BRB No. 00-1141)(Jan. 3, 2002)(*en banc*)(facility used to fabricate vessel components failed to meet "situs" requirement despite fact ship repair was its *raison d'etre*) for discussion of Fourth Circuit's *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT)(4th Cir. 1998), *cert. den*., 525 U.S. 1040 (1998)(contiguity of steel fabrication plant (1/3d fabricating steel for maritime use) with dock to navigable waters only fortuitous thus situs test not met).

[9] "Situs" test not met where gypsum products plant was not an "adjoining area", under Act, and not an area used exclusively for maritime purposes or activities of loading, unloading, building, or repairing ships, despite fact parts adjoined navigable waters. The perimeter of an "area" is defined by function and that area must be one customarily used by an employer in loading, unloading, repairing, or building a vessel. *Bianco* at 60, *citing Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980)(*en banc*) at 515. In *Charles v. Universal Ogden Services*, 37 BRBS 37 (BRB No. 02-0511)(April 17, 2003), a food storage warehouse was not considered an "adjoining area" where its location had no functional relationship to the Miss. River, was too far from the Gulf coast docks (65-70 miles) to be

that "adjoining areas" need not be contiguous to navigable waters, nor a prescribed distance from the water's edge.[10] *See Palmer Delta Marine Industries*, 12 BRBS 957 (1980); *Texports, su*pra, and *Zeringue v. McDermott, Inc*., 32 BRBS 75, BRB No. 98-435 (Dec. 8, 1998)(sites "customarily used for significant maritime purposes").[11] But see *McCormick v. Newport News Ship Building and Dry Dock Co*., 32 BRBS 207 (1998)(arising in 4th Cir.) and *Sidwell v. Express Container Services, Inc*., 71 F.3d 1134 (4th Cir. 1995) cert. den. 116 S.Ct. 2570 (1996)(an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters).

Under the "status" test of Section 2(3), coverage under the LHWCA is restricted to those "engaged in maritime employment." The "status" test is independent of the "situs" test. *McCray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81 (CRT)(9th Cir. 1999). This test is satisfied if the claimant's duties are "an integral part" of the longshoring, shipbuilding or ship repair process. *Northeast Marine Terminals v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2d 320, [6 BRBS 150] (1977). The courts are required to look beyond the claimant's job title since it is the function and nature of the duties which determine status. *Caputo, supra*; *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476 [5 BRBS 393] (3d Cir. 1977); *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (BRB No. 00-0928B)(July 11, 2001)(Examine nature of the work not the employer's name, i.e., a casino), 313 F.3d 300 (5th Cir. 2002)(status denied). "First, the work must be 'maritime' for the person to be an 'employee.'" McCray, 33 BRBS at 83. In order for one's job to meet the status test, the duties for the employer must be a "necessary link in the chain of work that resulted in ships being built and repaired." *Graziano v. General Dynamics*, 663 F.2d 340 [14 BRBS 52] (1st Cir. 1981), rev'g 13 BRBS 16 (1980); *Jackson v. Atlantic Container*, 15 BRBS 473 (1983).

The Supreme Court has also held that coverage extends to workers, who although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 62 L. Ed. 2d 225, 100 S.Ct. 328 [11 BRBS 320] (1979); *see also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, [23 BRBS 96(CRT)] (1989)[12]; *Gonzalez v. Merchants Building Maintenance*, ___

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considered part of that area and, functioned as a warehouse from which trucks, not vessels, were loaded. In *Dickerson v. Missippi Phosphates Corp.,* 37 BRBS 58 (BRB No. 02-0547)(April 29, 2003), a fertilizer plant (not connected by conveyor belts) with a dock 100 feet from the waters edge (which received unfinished product) was not a covered "situs" where it was not one listed in Section 3(a) and lacked a maritime use.

[10] *See, Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (BRB No. 99-0573)(Mar. 1, 2000) for a review of the law in this area.

[11] *See, Uresti v. Port Container Industries, Inc*., 34 BRBS 127 (BRB No. 99-432)(Aug. 21, 2000) *aff'g on recon.* 33 BRBS 215 (1999)(arising in 5th Cir.)(Regarding "customary use". Covered situs found for warehouse storing maritime cargo after it was unloaded and before it entered stream of land transportation). *See also, Nixson v. Mobile Mining & Minerals*, ___ F.3d ___ (Case No. 99-60273)(5th Cir., Feb. 7, 2000), *aff'g* BRB No. 98-988 (March 2, 1999), *pet. for cert. filed*, No. 00-44 (July 6, 2000). See *Jones v. Aluminum Co. of America [Jones II]*, 35 BRBS 37 (2001), citing *Stroup v. Bayou Steel Corp*., 32 BRBS 151 (1998), for discussion of the "function", i.e., the loading, unloading, repairing or building of vessels, of the adjoining area. *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999)(Covered employee working in building, near navigable waters connected by conveyor belts to loading area, where finished fertilizer products stored to await further transshipment by vessel met "situs" test).

[12] In *Watkins v. Newport News Shipbuilding and Dry Dock Co.*, 36 BRBS 21 (2002) at 23, the Board found error in the judge's failure to draw the "inference" mandated by *Schwalb*, that is that the claimant's failure to do her job would lead to an eventual shut down of the loading process or impede the shipbuilding process. *See also Sea-Land*

BRBS ___, BRB No. 98-1633 (Sept. 21, 1999)(Schwalb test not met); and, *McKenzie v. Crowley American Transport, Inc*., 36 BRBS 41 (BRB No. 01-0565)(April 3, 2002).

The parties have agreed and I find that the claimant's employment as a barge loader at the harbor facility, with the Employer, a maritime employer, constitutes qualifying maritime employment and that his regular work, at the time of the injury, at the Harbor facility, on the Monongahela River, which constitutes a qualifying adjoining situs satisfies the "situs" requirement. Thus, I find coverage (jurisdiction), under the Act.

RESPONSIBLE EMPLOYER

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, ___ F.3d ___, No. 00-4180, 35 BRBS 41(CRT)(2d Cir. 2001) (citing *Fitzgerald v. Stevedoring Services of America*, BRB No. 00-0724, 2001 WL 94757, at 4 (2001)(en banc)). Under the Act, an "employee" is defined as "any person engaged in maritime employment" and "employer" is defined as "an employer of any of whose employees are employed in maritime employment." 33 U.S.C. § 902(3), 902(4). The Board has applied three tests to determine if such a relationship exists: (1) the relative nature of the work (i.e., the nature of the claimant's work and its relation to the employer's regular business); (2) the right to control the details of the work; and, (3) Restatement (Second) of Agency, Section 220, subsection 2, which encompasses factors set forth in each of the other two tests. A judge must apply whichever test is best suited to the facts of the particular case. *Marinelli*. Since the claimant's disabling injury occurred while he was employed by Cumberland Resources, LP, in February 2004, the named employer is the responsible employer.

TIMELINESS OF NOTICE

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See, Blanding v. Director, OWCP [Oldham Shipping*], 33 BRBS 114(CRT)(2d Cir. 1999) (citing *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982)). Failure to give timely notice may bar a claim.

Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, but a claimant is required, in the exercise of

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Service, Inc. v. Rock, 953 F.2d 56, 67 (3rd Cir. 1992). In *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002) at 55, the Board observed, "In *Schwalb*, the Supreme Court stated, 'It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed.'"

reasonable diligence, to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. *Osmundsen v. Todd Pacific Shipyard*, 755 F.2d 730, 732 and 733 (9th Cir. 1985); *see* 18 BRBS 112 (1986) (Decision and Order on Remand); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986); *Cox v. Brady Hamilton Stevedore Company*, 18 BRBS 10 (1985); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc*., 15 BRBS 299 (1983); *Stark v. Lockheed Shipbuilding and Construction Co*., 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Thorud v. Brady-Hamilton Stevedore Company*, 18 BRBS 232 (1986). *See also Bath Iron Works Corporation v. Galen*, 605 F.2d 583 (1st Cir. 1979); *Geisler v. Columbia Asbestos, Inc*., 14 BRBS 794 (1981).

The parties agreed and I find the claimant became aware of the relationship between his injury and employment on, February 3, 2004, the date of his accident, and provided the employer with notice of said injury, on February 3, 2004, within thirty days. Thus, the claimant filed timely notice of his claim.

TIMELINESS OF CLAIM

As a threshold matter, I must consider whether the claimant timely filed his claim. A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221. Failure to file a claim within the year may bar any right to compensation. "The time for filing a claim shall not begin to run until the employee . . . is aware, or by reasonable diligence should have been aware, of the relationship between the injury or death and the employment." *Id*. In order to determine whether the prescription has run, "we look to the employee's appreciation of the relation between his injury and his employment. For the prescription to run against him, he must know (or should know) the true nature of his condition, i.e., that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141 [16 BRBS 100(CRT)] (5th Cir. 1984) *but see LeBlanc v. Cooper/T. Smith Stevedoring*, No. 96-60767(5th Cir. Dec. 12, 1997)("awareness" requirement applicable only to occupational disease cases); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970)(reasonable belief of work related harm which would probably diminish capacity to earn living); *Newport News Shipbuilding and Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT)(4th Cir. 1991)(traumatic injuries); *Hodges v. Caliper, Inc*., 36 BRBS 73, 75, 77 n. 5 (2002)(Mere occurrence of a work accident does not trigger § 13(a) limitations period, absent the awareness of a likely decline of future wage-earning capacity). (If voluntary payments have been made, a claim may be filed within one year of the last payment.) An employee becomes aware of this relationship if a doctor discusses it with him. *Aurelio v. Louisiana Stevedores*, 22 BRBS 418 (1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); *Fortier v. General Dynamics Corporation*, 15 BRBS 4 (1982), *appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board*, 729 F.2d 1441 (2d Cir. 1983); *Carlisle, supra*.

The claimant filed the claim on November 16, 2004, within weeks of the termination of the suspension by the employer, on October 9, 2004, of voluntary payment of temporary total disability payments. I find therefore that the claim was timely filed.

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2); *see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982*), rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc*., 627 F.2d 455 (D.C. Cir. 1980).

In this case, the parties have stipulated that a work-related injury occurred on February 3, 2004, within the course and scope of the claimant's employment with the respondent Company. Thus, the issue to be addressed is the nature and extent of the claimant's disability, if any.

DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.[13] 33 U.S.C. § 902(10); *see also, Metro Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 127 (1997). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc*., 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. *Id.* at 1266

[13] A disability determination turns on the claimant's capacity for work rather than her actual employment status. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported); *Newport News Shipbuilding & Dry Dock Company v. Vinson*, (Unpublished)(4th Cir. No. 00-1204)(June 20, 2002). Although such an award is the exception, a claimant may still be entitled to permanent and total disability benefits following a period of employment. *See, e.g., Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978) (claimant worked in spite of excruciating pain); *Paul v. General Dynamics Corp*., 13 BRBS 1073 (1981) (claimant's employment only possible due to extraordinary effort); *Walker v. Pacific Architects & Engineers Inc*., 1 BRBS 145 (1974) (claimant's employment due merely to employer's benevolence).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); & *Hunigman v. Sun Shipbuilding & Dry Dock Co*., 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co*., 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a prima facie case of total disability by showing he cannot return to his regular employment due to a work-related injury.[14] *Trask v. Lockheed Shipbuilding Co*., 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co*., 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp*., 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

The Judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp*., 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi,* that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id.*

Mr. Riley's job as a barge loader was without question a sedentary one which he himself characterized as "pretty easy." It required little more than pushing buttons on the control panel and manipulating a joystick, all while sitting. Mr. Riley admitted the barge loaders rarely have to push more than one button at a time and that one can stand to push buttons on the top part of the console. Although Mr. Kiger testified, and I find that, a one-arm person could perform the job, the use of two arms might be preferable, but unnecessary. The work requires only

[14] Even if able to work, one may be found totally disabled if working with extraordinary effort and in excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715 (11th Cir. 1988) and *Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); and *Newport News Shipbuilding & Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported).

occasional walking and standing which Mr. Riley can do, despite his weight. Barge loaders are rarely required to lift, carry, reach overhead, grip or climb stairs. Mr. Riley admittedly can do all of that with his left arm, but has some limits and discomfort using his right arm and shoulder. He can climb stairs, although I find climbing to and from the barge loader's pulpit, up or down 17 metal stairs, in inclement conditions using one arm is less than satisfactory. Barge loaders must occasionally reach at or below shoulder level to operate a lever or joy stick and buttons. They need not have forearm rotation, manual dexterity, bend, twist or kneel. In this case, the employer was not only willing to accommodate Mr. Riley's right arm and shoulder limitations, but ordered a new swivel chair which could be raised and lowered to make the work easier.

Mr. Riley was seriously injured on February 3, 2004, fracturing ribs and sustaining a right shoulder rotator cuff tear with impingement. His initial physical therapy, from February 6-June 3, 2004, was ineffective. The diagnostic tests and examinations clearly establish the right shoulder rotator cuff tear. Thus, Dr. Avolio recommended surgery for the rotator cuff repair and acromioplasty. That surgery, on June 23, 2004, revealed a tear of the supraspinatus with detachment from the greater tuberosity. The surgery repaired the tear with sutures and an anchor. The post-surgical MRI scan, on July 11, 2005, showed no tear or retear and Dr. Avolio, Mr. Riley's surgeon found he had no signs of impingement or frozen shoulder.

Although Mr. Riley's post-surgical physical therapy, at NovaCare, between July 26 and September 13, 2004, showed some improvement, Mr. Riley continued to experience pain, discomfort and limited use of his right arm and shoulder. However, Mr. Riley stopped attending physical therapy after ending treatment with Dr. Avolio, on October 6, 2004. At that time, Dr. Avolio believed he could be released to work, at least after another three weeks of physical therapy. Dr. Avolio opined that Mr. Riley could have performed his duties even with a retear of his rotator cuff.

The employer ended Mr. Riley's temporary total disability benefits, on October 9, 2004. He returned to work on October 10, 2004 and worked intermittently for six days. While there is some dispute about what he had to do during that period, Mr. Riley testified that extending his right arm aggravated his pain so severely that he left work early on a few occasions, returned home and took pain pills.

As set forth above, Mr. Riley testified extensively about his right shoulder condition. It has limited his activities and has caused pain and discomfort. He testified he can only reach out a few inches in front of his stomach, but admits he has no problem moving his lower right arm.

Dr. Mitchell, a board certified treating orthopedic surgeon, concluded that the rotator cuff tear is not the problem, rather the bony blockage, at the point of the anchor used in his shoulder surgery, obstructs and impinges complete motion and causes pain. That occurs when Mr. Riley maneuvers at "nipple level and higher". As long as the bony blockage remains, he believes there is no possibility Mr. Riley can use his right arm to do the job. Furthermore, because of the high risk of additional surgery causing complete lameness, surgery is not a realistic option, according to Dr. Mitchell. He concludes Mr. Riley has permanent limited shoulder function. As of December 6, 2005, Dr. Mitchell reported Mr. Riley had 80 degrees of abduction, 70 degrees of external rotation, and 160 degrees of elevation, an improvement.

Physical therapist Sweeney measured Mr. Riley's reach while seated, on December 8, 2005. He was able to reach 23 inches from the midline of his shoulder or 6-8 inches from the front of his knees. He was able to elevate his right arm 40 inches or 75 to 80 degrees of flexion, but could not sustain it for more than a minute due to pain.

Dr. Tucker, a board certified orthopedic surgeon, reviewed Mr. Riley's medical history and examined him on January 4, 2005. He concluded then that Mr. Riley was "clearly capable of performing work duties. . . [E]ven if he has failed to heal his rotator cuff tear and if he has frozen shoulder, the range of motion he should be able to obtain with his arm is clearly sufficient to perform the essential and secondary aspects of his pre-injury job." He found that Mr. Riley could reach (with some restriction), grasp, perform "fine manipulation, push and pull, and perform light to medium work.

After updating the information he relied upon, Dr. Tucker reiterated his conclusions during his December 9, 2005 deposition. He testified that about 83 percent of shoulder surgery patients, in their 50s or early 60s, have functional recovery within six months, but continue to have improvement for up to two years post-surgery. (Dep. p. 13). His January 2005 x-ray revealed some arthritis and a small bone spur. Dr. Tucker believed Mr. Riley had been uncooperative in the range of motion tests, observing that his other providers had measured a better range of motion in all instances. Dr. Tucker testified that while Mr. Riley had limitations, but could reach with his right arm for two to three hours per day at chest level and "certainly" at waist to chest level without limitation. (Dep. 23).

Based on his review of MRIs, 10/28/04 and 1/11/05, Dr. Tucker found no evidence of any bony blockages. (Dep. 24). Unlike Dr. Mitchell, he finds the relationship of the humerus to the glenoid or the ball and socket part of the shoulder and the other bony relationships in his shoulder normal. (Dep. 25). He, himself had never seen such a bony blockage in his years of shoulder surgery. Dr. Tucker's review of the EMG and nerve conduction study revealed "very clearly" the absence of any nerve dysfunction, neuritis, or neuropathy of the suprascapular nerve such as that diagnosed by Dr. Mitchell. (Dep. 27-28). Based on his review of the additional medical evidence, Dr. Tucker testified that he would "lift" the two to three hour restriction on reaching.[15] (Dep. 29). He added, there is no limitation reaching at or below chest level and occasional overhead reaching could be done. (Dep. 29). Dr. Tucker opined Mr. Riley has not yet reached maximum medical improvement since the medical records show progressive improvement, most notably with physical therapy. (Dep. 30). With the improvement from physical therapy, Dr. Tucker opined that Mr. Riley would not require additional surgery. (Dep. 34).

The analysis, in this case, is somewhat difficult by the lack of consistent measurements of Mr. Riley's range of motion. Some measured abduction, others adduction, and some did not say which it was. Most measured flexion. Since Mr. Riley's duties required minimal, if any

[15] Claimant's counsel objected to a correction of the deposition transcript to change the misreported word from "limit" to "lift". (Dep. 29). That objection is overruled. Dr. Tucker's other testimony on that page is consistent with the correction.

"abduction," i.e., raising the elbow and arm outwardly by one's side, that measurement is not the most useful. Moreover, Mr. Riley's duties required minimal, if any "adduction," i.e. moving the elbow toward the middle of the belly. The "normal" range of motion is considered to be from 180 degrees abduction to 50 degrees adduction with the "position of function" from 50 degrees abduction to 20 degrees abduction. AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (Revised Third Ed.)(1990), Chapter 3, Section 3.1. Adduction was never a problem for Mr. Riley; he could move 85 to 145 degrees presurgery. That measurement was not post-surgery. After surgery, his active abduction went from 75 degrees to 85 degrees with Dr. Avolio and up to 80 degrees with Dr. Mitchell, in December 2005. That means he could raise his arm up outwardly from his side to just 10 degrees less than straight out from shoulder level, which would be 90 degrees. That is more than enough movement to perform his job.

Extending the arm fully, i.e., what one would do when reaching, is the action perhaps most relevant to his duties, along with "flexion" or the ability to raise the arm up and down while extending it outward in front of the individual. Flexion is needed in the job, up to shoulder level or up to about 90 degrees flexion. Mr. Riley's flexion went from 110 degree pre-surgery to 90 degrees, on October 6, 2004, as reported by Dr. Avolio, and 75-80 degrees as reported by Sweeney Rehab. Dr. Mitchell's measurement of 160 degrees elevation could be either abduction or flexion. Either Dr. Avolio's 90 degree or Sweeney's 75-80 degree measurement show sufficient range of motion for Mr. Riley to perform his duties with his right arm and shoulder. With 90 degrees flexion, one could perform the job seated. 75-80 degrees of flexion might mean that one would have to occasionally stand or raise one's seat. In any case, one could use the unimpaired arm to perform the job as well. Thus, I conclude, from a strictly mechanical point of view, that Mr. Riley is not incapable of performing duties as a barge loader.

However, a claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Construction*, 13 BRBS 882, 884 (1981). However, a judge may find an employee able to do his usual work despite complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Authority*, 13 BRBS 891 (1981). Mr. Riley testified that he has constant pain and discomfort, a matter corroborated by his wife, who assists him with several daily living activities. Dr. Mitchell also noted Mr. Riley's complaints of pain during his treatment through October 12, 2005 as did therapist Sweeney. Mr. Riley has the right arm/shoulder pain regardless of whether he uses the arm/shoulder or not and it is exacerbated when he uses the upper right extremity. Dr. Mitchell found the pain complaints corroborated by pathologic physical findings and continues to prescribe pain medication for the claimant. (CX 19). Mr. Riley's medical records are replete with evidence that his pain limits his motion. The employer has not rebutted this evidence of pain.

On the basis of the record provided, I conclude that the claimant has established that he cannot return to work as a barge loader due to the injuries he suffered due his credible complaints of constant pain.

Suitable Alternate Employment[16]

Once the claimant meets his prima facie showing that he cannot return to his usual work, the burden shifts to the employer to show suitable alternative employment or realistic job opportunities in the relevant geographic market which the claimant is capable, e.g., physically and educationally qualified, of performing and which he could secure if he diligently tried.[17] *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Bethlehem Steel Corp*., 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Lentz v. Cottman Co*., 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), *aff'g Hansen v. Bumble Bee Seafoods*, 7 BRBS 680 (1978); *Berezin v. Cascade General, Inc*., ___ BRBS ___ (BRBS Nos. 00-0250 and 00-257, Nov. 14, 2000); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub. nom., Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *McCabe v. Sun Shipbuilding & Dry Dock Co*., 602 F.2d 59, 10 BRBS 614 (3rd Cir. 1979) *aff'g in pertinent part* 7 BRBS 333 (1977); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 10 BRBS 81, 86-87 (4th Cir. 1979); *American Stevedores, Inc., v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976) *aff'g* 2 BRBS 178 (1975); *Rinaldi v. General Dynamics Corp*., 25 BRBS 131 (1990); *Pilkington v. Sun Shipping & Drydock Co*., 9 BRBS 476, 477 (1978); *Sam v. Loffland Brothers Co*., 19 BRBS 228 (1987); *see Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) and, *Bunge Corp. v. Carlisle*, 34 BRBS 79(CRT)(adopting test from First, Fourth, and Fifth Circuits for determining whether defendant offered suitable alternate employment).

While the claimant generally need not show that he has tried to obtain employment, *Shell v. Teledyne Movible Offshore, Inc*., 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. *Wilson v. Dravo Corporation*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Company*, 17 BRBS 156 (1985).

The employer need not show an actual job offer but must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Trans-State Dredging v. Benefits Review Board (Tarner*), 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). For the job

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[16] *Newport News Shipbuilding & Dry Dock Company v. Director, OWCP [Wiggins]*, No. 00-2532 (4th Cir. December 14, 2001)(Unreported). *Cooper v. Offshore Pipelines Int'l, Inc*., 33 BRBS 46 (1999) (no wage-earning capacity shown where claimant worked in odd jobs beyond his physical limitations and medical restrictions, and in spite of pain and discomfort); *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941 (5th Cir. 1992) (employment unsuitable where claimant endures pain consistently); *Paul v. General Dynamics Corp.*, 13 BRBS 1073 (1981) (employment unsuitable where claimant experienced difficulty, and thus exhibited extraordinary effort, in getting to and from work and around his work station).

[17] Once it is found an employer has not established the availability of suitable alternate employment, the issue of whether the claimant diligently sought work need not be addressed. *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) n. 15, *citing Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Williams v. Halter Marine Service, Inc*., 19 BRBS 248 (1987).

opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Construction Co*., 21 BRBS 94, 97 (1988); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367, 379 (1990).

A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co*., 22 BRBS 332 (1989); *American Stevedores v. Salzano*, 538 F.2d 933, 935 (2d Cir. 1976). If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total.[18] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Rinaldi v. General Shipbuilding Co*., 25 BRBS 128 (1991); *Seguro v. Universal Maritime Service Corp*., 36 BRBS 28 (BRB 2002); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544 (9th Cir. 1991). The claimant may rebut an employer's showing of alternative employment by demonstrating that he diligently tried but was unable to secure such employment. *Palombo*; *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540 (4th Cir. 1988)(and retain eligibility for total disability benefits); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. den*., 479 U.S. 826 (1986).

A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, *Peele v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224, 226 (1987), and if the job is available to claimant. *Wilson v. Dravo Corp*., 22 BRBS 463, 465 (1989); *Beaulah v. Avis Rent-A-Car*, 19 BRBS 131, 133 (1986); *Arnold v. Nabors Offshore Drilling, Inc*., 35 BRBS 9 (2001). If the employer's proof of suitable alternative employment is based on such a job, the judge must ascertain whether a specific job was offered to the claimant and then determine whether he could perform the duties thereof. *Stratton v. Weedon Engineering Co*., 35 BRBS 1 (2001). The employer kept Mr. Riley's job open for him until he retired and was willing to have him work within his limitations. I have found that while "mechanically" Mr. Riley was able to perform his duties, that he is unable to do so due to constant pain. Thus, suitable alternative employment has not been established. No other evidence of suitable alternative employment has been submitted.

There is no provision in the Act requiring a claimant who suffered a traumatic injury to establish that his retirement from his employment was instigated solely by his disability. *See Harmon v. Sea-Land Services, Inc*., 31 BRBS 45 (1997). The issues of voluntary versus involuntary retirement arises in cases involving occupational diseases.

On the basis of the totality of this record, I find and conclude that the claimant has established that he cannot return to work as a barge loader. The burden thus rested upon the employer to demonstrate the existence of suitable alternative employment in the area. If the employer does not carry this burden, the claimant is entitled to a finding of total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

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[18] From the date of MMI until the date suitable alternate employment is shown, the claimant's disability is total. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 20 BRBS 155 (1989), *cert. den.* 498 U.S. 1073 (1991).

In the case at bar, the employer did not submit any additional evidence as to the availability of suitable alternative employment. *See Pilkington v. Sun Shipbuilding & Dry Dock Company*, 9 BRBS 473 (1978), *aff'd on reconsideration after remand*, 14 BRBS 119 (1981). *See also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp*., 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp*., 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co*., 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co*., 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[19] *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id.*

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp*., 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co*., 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 27 BRBS 192 (1993), *aff'd* 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further

[19] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

could be done); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, (Brickhouse), ___ F.3d ___, 36 BRBS 85(CRT)(4th Cir. 2002); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co*., 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician.[20] *See Steig v. Lockheed Shipbuilding & Construction Co*., 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom*., *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp*., 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co*., 18 BRBS 25, 32 (1986), *pet. dismissed sub nom*., *Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, Air *America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co*., 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone.[21] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp*., 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra*. *See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction*

[20] In *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997), the Board found it proper to credit a physician's opinion setting an MMI date after issuance of ALJ's decision based on the normal healing period following knee surgery and not merely on the eventuality the condition may further improve in the future.

[21] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

Corp., 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc*., 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp*., 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co*., 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co*., 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding & Dry Dock Company*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*.. The Board has held that an irreversible medical condition is permanent per se. *Drake v. General Dynamics Corp*., 11 BRBS 288 (1979).

Dr. Mitchell, who continues to treat Mr. Riley, opined that further surgery is not advisable due to the high risk of precipitating lameness in the right arm and shoulder. He concluded essentially that the claimant has reached MMI because the bony blockage is the cause of the problem and it cannot be alleviated without surgery. He has prescribed a course of physical therapy treatment. Dr. Avolio, who had performed the shoulder surgery, in June 2004, opined there is no evidence of post-surgical rotator cuff tear or retear, no signs of impingement or the shoulder becoming frozen. He noted progressive improvement through physical therapy and would have returned the claimant to work in October 2004. Sweeney Rehab reported progress through physical therapy, but noting Mr. Riley's complaints of pain continued with overhead and rotary movements, as of July 2005. Sweeney also noted pain, in December 2005, when Mr. Riley held his arm up more than a minute. Moreover, the claimant admitted that his symptoms and mobility have improved with physical therapy and injections. (TR 99-100).

Dr. Schmieler, an Independent Medical Examiner, would have returned the claimant to sedentary work on October 8, 2004, after conducting an examination. (EX 8). Dr. Tucker's review of the 11/2004 EMG and nerve conduction study revealed "very clearly" the absence of any nerve dysfunction, neuritis, or neuropathy of the suprascapular nerve such as that diagnosed by Dr. Mitchell. It is not reported whether Dr. Mitchell reviewed the EMG/nerve conduction study. In fact, Dr. Kaplan, who conducted the EMG found a generalized moderate to severe electrophysiologically bilateral polyneuropathy, i.e., a disease involving several nerves.

Dr. Tucker found no type of "bony blockage" as reported by Dr. Mitchell, nor had he ever seen such a thing in his years of orthopedic shoulder surgery. Dr. Tucker has more "hands-on" practice than Dr. Mitchell. While Dr. Tucker's x-ray revealed a small inferiorly projecting spur, his x-ray of January 4, 2005 did not show a "bony blockage". Both Drs. Mitchell and Tucker had reviewed the claimant's MRIs and both had an x-ray they relied upon to support their conclusions. Based on the medical records and progression in physical therapy, Dr. Tucker opined that MMI had not been reached, as of December 2005, nor was Mr. Riley permanently and totally disabled. The opinions of these two physicians, with nearly comparable qualifications, are conflicting. However, Dr. Avolio, who performed the surgery, had also reviewed a post-surgical MRI and not mentioned any "bony blockage". Thus, I find the evidence presented does not establish the same. Likewise, the evidence shows there is no tear or retear of the rotator cuff. Moreover, Dr. Tucker's testimony that it can take up to two years post-surgery for recovery is not refuted. Thus, based upon Dr. Avolio's earlier opinion, the physical therapy records showing some progressive improvement in range of motion, Mr. Riley's admissions, Dr. Tucker's review of Dr. Kaplan's EMG/nerve conduction study and his deposition testimony, I find MMI is not established, as there is some likelihood of recovery.

On the basis of the totality of the record, I find and conclude that the claimant has not reached maximum medical improvement. He has that he has been temporarily and totally disabled from October 10, 2004 onward.

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the credible testimony of the claimant, and the medical opinions discussed above, I find that the claimant is entitled to[22] temporary total disability benefits.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); see also 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc*., 8 BRBS 130, 140 (1978).[23]

[22] One with a scheduled injury is presumed to be disabled even though the injury does not actually affect his earnings. *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (July 17, 2001) citing *Bath Iron Works Corp*., 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 26 BRBS 151(CRT). In contrast, for non-schedule injuries, loss of wage-earning capacity is an element of the claimant's case.

[23] *See Shriver v. General Dynamics Corp*., 34 BRBS 370(ALJ)(2000) for an exhaustive list of medical expenses the appellate courts and the Board have approved and disapproved. *See Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997) where the Board reversed prior decisions to hold interest may be assessed on past-due sums for medical services whether the costs were initially borne by the claimant or the providers. In *Plappert v. Marine Corps. Exchange*, 31 BRBS 13 (1997), the Board found the employer entitled to a hearing over "contested" medical

Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co*., 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp*., 7 BRBS 234 (1977).

The employer here covered the claimant's medical expenses from the time of his injury through and including October 9, 2005.

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co*., 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary.[24] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment. *Salusky v. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp*., 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc*., 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled. *Bulone v. Universal Terminal and Stevedore Corp*., 8 BRBS 515 (1978); 20 C.F.R. § 702.403; *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998) modified, 164 F.3d 480 (1999). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co*., 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a); *but see Shoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996)(expenses may be limited to those costs which would have been incurred locally).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp*., 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc*., 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v.*

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expenses. In *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996), the Board ruled there is no section 20(a) presumption concerning such bills.

[24] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Linsay v. George Wash. Univ.*, 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns-Manville Sales Corp*., 508 F.Supp. 313 (D. Me. 1981). *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988)(Improper, unauthorized medical treatment is not reimbursable).

Neuman, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc*., 18 BRBS at 189 (1986). The burden of proving compliance with section 7(d) is on the claimant. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

An employer's physician's determination that the claimant is fully recovered is tantamount to a refusal to provide treatment. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Shahady v. Atlas Tile & Marble Co*., 682 F.2d 968, 970 (D.C. Cir. 1982) *(per curium), rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. *Roger's Terminal and Shipping Corporation v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988).

While Dr. Mitchell has not recommended further surgery, he has prescribed a course of further physical therapy and pain medication prescriptions.

In light of my findings above that the claimant is totally and temporarily disabled due to injuries of his right upper extremity suffered in the February 3, 2004 accident, I find his treatment for the same, including physical therapy, prescribed pain medications, further evaluation and treatment, surgical or not, was and is compensable under the Act.[25] The claimant shall present any related unpaid medical bills to the employer within thirty days of the date of this decision and the latter shall reimburse the same.

COMPENSATION FORMULAE[26]

Section 8 of the Act, identifies four different categories of disability and sets forth the scheme for the payment of compensation for disability for each.[27] Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c), dealing with permanent partial disability, covers twenty different specific injuries and an additional provision which applies to an injury not included within the list of specific injuries. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability.[28]

[25] See 20 C.F.R. § 702.413 when there is a dispute concerning the amount of a medical bill.

[26] Benefits may not be awarded for pain and suffering. *Young v. Todd Pacific Shipyards Corp*., 17 BRBS 201 (1985).

[27] Section 6(b)(1) imposes a cap on both disability and death benefits equivalent to 200 percent of the national average weekly wage.

[28] No compensation, except medical benefits, may be paid for the first three days of a disability unless the injury results in disability of more than fourteen days. 33 U.S.C. § 906(a).

Temporary Total Disability

Under section 8(b), in cases of temporary total disability, the employee is compensated with 66 2/3 percent of the AWW during the period of the disability.

AVERAGE WEEKLY WAGE

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp*., 17 BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp*., 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997).

The parties have stipulated and agreed and I find that the claimant's AWW is $1409.50 with a compensation rate of $939.66 (AWW x 2/3).

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom*., *Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills… ." *Grant v. Portland Stevedoring Co*., 16 BRBS 267, 270 (1984), *modified on recon*., 17 BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co*., 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co*., 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. §914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc*., 30 BRBS 101 (1996)(retired employee with hearing loss), at 105-106; *Meadry v. International Paper Co.,* 30 BRBS 160 (1996).

Here, the employer suspended payment of benefits claimant's for injury on October 9, 2004. He was "on-duty" status through October 20, 2004. Thus, interest must accrue from October 21, 2004. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

V. CONCLUSIONS

I find that Mr. Riley is totally and temporarily disabled from performing his employment as a barge loader. The responsible employer/carrier is Cumberland Coal Resources, LP/Old Republic Insurance Co. The date of maximum medical improvement has not been reached. His average weekly wage is $ 1409.50. Furthermore, the employer is liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's total and temporary disability, including prescribed medications and physical therapy. The claimant is further entitled to interest, at the appropriate rate on the accrued unpaid compensation benefits.

VI. ATTORNEY'S FEES AND COSTS

Thirty (60) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer/Carrier shall pay to the claimant compensation for his temporary total disability from October 21, 2004 through the present and continuing until MMI is reached, based upon an average weekly wage of $1409.50, such compensation to be computed in accordance with section 8(a) of the Act.

2. The employer/Respondents shall receive credit for all amounts of compensation previously paid to the claimant as a result of his right upper extremity injury. The employer shall also receive a refund, with appropriate interest, of all overpayments of compensation, if any, made to the claimant herein.

4. Interest shall be paid by the Employer/Respondents and/or Carrier on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. All under-payments of compensation shall be paid to the claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961. The Director shall determine the exact amount.

5. Pursuant to § 7 of the Act, the employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the claimant's work-related injury referenced herein may require, subject to the provisions of section 7 of the Act.

6. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

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RICHARD A. MORGAN
Administrative Law Judge

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..